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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS ZAPATA, Defendant and Appellant.	B204657 (Los Angeles County Super. Ct. No. KA074774)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jesus Zapata (appellant) of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 187, subd. (a), 664) (count 1) and found true the allegations that appellant had personally used and personally and intentionally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivisions (b), (c), and (d). In count 2, the jury convicted appellant of second degree robbery (§ 211) and found true the same firearm allegations. The trial court found true the allegations that appellant had suffered 11 prior serious felony convictions (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i); 667, subd. (a)).

The trial court denied appellant's motion to strike the prior conviction allegations and sentenced appellant to a total of 95 years to life in state prison. On count 2, the sentence consisted of 25 years to life with an additional 25 years to life for the firearm-use enhancement and an additional five years for each of the two prior serious felony allegations. On count 3, the court imposed 25 years to life and five years for each of the two prior serious felony allegations. The court stayed the 25 years-to-life enhancement under section 12022.53, subdivision (d) pursuant to section 654. The trial court struck the remaining firearm-use enhancements.

Appellant appeals on the grounds that: (1) the trial court erred by failing to stay the sentence on count 3 pursuant to section 654, and (2) in the alternative, the federal constitutional right to trial by jury as set out in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) was violated by the trial court's determination that appellant had separate objectives in the commission of the two crimes of which he was convicted.

FACTS

We summarize the facts in the light most favorable to the judgment below. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Jane Doe (Doe) and her husband, Jorge Perez (Perez) were going through divorce proceedings in November 2004. Perez had been physically abusive throughout their relationship. Perez told Doe that he would use his share of the proceeds from the sale of their home to have her "taken care of."

On January 12, 2005, Doe was preparing to enter her car parked in her driveway when a man, later identified as appellant, "popped up" from behind the passenger side of

the car. He was carrying a gun in one hand and a pillow in the other, and Doe heard him cock the gun. Appellant told Doe to get in the car.

Doe said she would not get in the car, and appellant said, "'If you don't want anything to happen to your kids, you better listen to what I say.'" Doe had two children. She offered appellant her car keys and asked him not to hurt her, but appellant refused the keys. Appellant told Doe to give him her money and told her to remove it from her wallet. Appellant took the money and told Doe to get down on the ground. Doe began to get down but was afraid she would be shot in the back, and she began to rise. Appellant shot Doe in the left arm, and Doe began to run back to her home. Appellant fired more shots in her direction. She was struck in the face, the wrist, and the upper back. Doe ran inside the house and appellant ran away.

Doe's grandmother called 911, and Doe was airlifted to a hospital. She suffered multiple fractures of the sinuses and her left arm was fractured. Doe later described her assailant as having a moustache and wearing a black sweater, black gloves, glasses with no lenses, and a mask with braids that were connected to a cap. A wig, a beanie, and a pillow with bullet holes were found in Doe's front yard.

On March 4, 2005, Officer Ramiro Vergara of the Santa Ana Police Department stopped appellant for a traffic violation. After finding a methamphetamine pipe on appellant's person, Officer Vergara searched the car. He found a baggie containing six live bullets under the center console of appellant's car. He found a semiautomatic handgun under the dashboard.

Robert Hawkins, a firearms examiner, was of the opinion that the casings found at the shooting scene were fired from a gun similar to or the same as the gun found in appellant's car. Susannah Jarvis (Jarvis), a criminalist with the Los Angeles County Sheriff's Department, examined the DNA extracted from the cap and wig found in Does' and Silva's front yard. Jarvis concluded that there were multiple contributors to the DNA from the cap, and appellant, from whom a DNA sample had been taken, was included as a possible contributor. Only one out of 167 billion people could have the same genetic code as the DNA found in the cap. Edward Buse, a DNA examiner with the Orange

County Sheriff's Department, concluded that the major contributor of the DNA found on the grip of the recovered gun was an unknown female. A minor contributor could have been appellant. Only one other person out of 10 billion people could have been the minor contributor of the DNA on the gun.

DISCUSSION

I. Count 3 and Section 654[1]

A. Appellant's Argument

Appellant contends there was no evidence to support the People's theory that his primary objective was murder and that robbery was a secondary matter. According to appellant, there was not a shred of evidence that appellant knew or had even met Perez, and no evidence that he had conspired with him to kill Doe. Therefore, the trial court's decision not to stay the sentence in count 3 was unsupported by substantial evidence. According to appellant, the judgment must be vacated and the matter remanded with directions to stay the sentence imposed on count 3.

B. Relevant Authority

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

"On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other,

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[1] Section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . . Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

C. Proceedings Below

Prior to sentencing appellant, the trial court asked the prosecutor what his position was on the robbery count, count 2, with respect to section 654. The prosecutor stated that he believed the robbery was a separate crime. The court stated, "It has been some time since the court tried this case, but if my recollection serves me correctly, the People's position in this matter was that the attempt murder was the primary objective. . . . And that the robbery was a secondary matter; is that correct?" The prosecutor confirmed that this was correct. Defense counsel stated she did not wish to be heard on the matter. The trial court then sentenced appellant to consecutive terms on the two counts.

D. Section 654 Does Not Apply

We believe the trial court correctly determined that, in committing the robbery and the attempted murder, appellant entertained separate intents and objectives. In any event, if the shooting of Doe had occurred merely in the course of the robbery, it was clearly an act of gratuitous violence against a helpless and unresisting victim, which has traditionally been viewed as an act not incidental to robbery for the purposes of section 654. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 (*Nguyen*) disapproved on other grounds as stated in *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 458, fn. 6.)

Although appellant claims there was "not a shred" of evidence to show that appellant conspired with Doe's ex-husband to kill her, we note that appellant was evidently lying in wait for Doe to appear that morning. He was carrying a pillow, which showed his intention to shoot her and use the pillow as a silencer. Doe was an unlikely victim for a random robbery and shooting with such preparation. Moreover, appellant

knew that Doe had children, in the plural. Appellant apparently decided to take whatever money Doe might have before carrying out the murder. He therefore harbored a separate intent to deprive Doe permanently of her property. (See CALCRIM No. 1600.)

Moreover, as we have stated, the amount of force appellant employed went beyond what was necessary to commit a robbery and amounted to a gratuitous act of violence. As the court in *Nguyen* concluded, "at some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Nguyen*, *supra*, 204 Cal.App.3d at p. 191.) And, "[w]e believe it is reasonably clear . . . that a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*Id.* at p. 193.)

In *Nguyen*, the defendant's accomplice took a market clerk into a rear bathroom, removed money and a passport from his pockets, and forced him to lie down on the floor. Nguyen opened the cash register and shouted a Vietnamese battle phrase used when someone was to be killed. His accomplice then kicked the clerk in the ribs and shot him in the back. (*Nguyen*, *supra*, 204 Cal.App.3d at p. 185.) The court held that substantial evidence supported the trial court's implied finding of divisibility because the shooting of the clerk constituted an act of gratuitous violence against a helpless and unresisting victim. (*Id*. at pp. 190-191 and cases cited therein; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272 (*Cleveland*) [attempted murder and attempted robbery are two separate crimes with separate intents when force exceeded what was necessary to take feeble and unresisting victim's Walkman]; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1296, 1299-1300 [attempted robbery and attempted murder are two separate offenses when defendant shot victim after victim refused to cooperate by act of closing cash register drawer].)

We believe the trial court could have reasonably concluded that the shooting of Doe even as she ran away was an act of gratuitous violence and was out of proportion to

the force necessary to rob her. Even if appellant committed the shooting in an attempt to avoid prosecution, the act was clearly carried out with an intent and objective separate from that of the robbery. (*Nguyen*, *supra*, 204 Cal.App.3d at p. 193.) Doe was an unresisting victim, even though she did not completely comply with appellant's orders to kneel down. It is clear that a person with a gun pointed at her and with her back to her assailant is not capable of resisting. Appellant's argument is without merit.

II. Section 654 Determination and *Apprendi*

A. Appellant's Argument

Appellant contends that the *Apprendi* holding[2] and rationale apply to the factual question at issue in his case; namely whether the attempted murder was a part of the robbery or was the result of a separate and distinct objective. Appellant concedes that in *Cleveland*, *supra*, 87 Cal.App.4th at page 268, Division Seven of this court rejected an identical claim. Appellant urges that the dissenting opinion, which would have held *Apprendi* applicable, is the better reasoned opinion. (See *Id*. at pp. 272-282.) Appellant maintains that the issue of whether multiple punishments are prohibited by section 654 is a factual question, unrelated to the fact of a prior conviction, to which appellant is entitled to a trial by jury and for which the standard of proof is beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490.) The failure to present this question to a jury with appropriate instruction cannot be held harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

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[2] The United States Supreme Court held in *Apprendi* that due process as well as the notice and jury trial guarantees of the Sixth Amendment mandate that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at pp. 476, 477, 490.)

B. Apprendi *Not Applicable to Section 654 Determination*

We disagree with appellant's contention and agree with the majority in *Cleveland* and with the court in *People v. Solis* (2001) 90 Cal.App.4th 1002 (*Solis*) that "'section 654 does not run afoul of the rule announced in *Apprendi*. The question of whether section 654 operates to "stay" a particular sentence does not involve the determination of any fact that could increase the penalty for a crime beyond the prescribed statutory maximum for the underlying crime. . . .'" (*Solis, supra,* at pp. 1021-1022, quoting *Cleveland, supra,* 87 Cal.App.4th at p. 266; see also *People v. Black* (2007) 41 Cal.4th 799, 820-823 (*Black II*) [*Apprendi/Cunningham*[3] inapplicable to imposition of consecutive sentences, which does not violate a defendant's Sixth Amendment right to a jury trial under section 669].)

Rather than discuss the rationales of *Apprendi*, *Solis* and *Cleveland* at length, it suffices to quote the relevant portions of the majority opinion in *Cleveland* with bracketed insertions pertinent to the instant case: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict. In *Apprendi*, the factual determination (i.e., the element of intent for the hate crime) which increased his sentence was not determined by the trier of fact under the reasonable doubt standard. Here, however, every factual element of the attempted murder and robbery was submitted to the jury, and

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3 *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*).

the jury found [appellant] guilty beyond a reasonable doubt of both crimes. Thus, the jury's verdict authorized the sentences [appellant] received for each crime. Indeed, in finding section 654 did not apply, [appellant] received the *same* sentence as he was exposed to by the jury's verdict. Where, as here, the nonjury factual determination allows for a sentence within the range already authorized by the verdict, *Apprendi* has no effect." (*Cleveland*, *supra*, 87 Cal.App.4th at p. 270.)

Although appellant argues that *Cleveland* was wrongly decided, we find its reasoning sound. Moreover, the California Supreme Court expressly approved of *Cleveland* and *Solis*, stating, "[f]or purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*People v. Black* (2005) 35 Cal.4th 1238, 1264 (*Black I*), overruled in part by *Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. 856, 871.) It is true that *Cunningham* reversed *Black I* with respect to California's system for imposing upper terms; however, it did not address the imposition of consecutive terms or the staying of terms under section 654.

We reject appellant's constitutional challenge to the trial court's section 654 determination.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ